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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

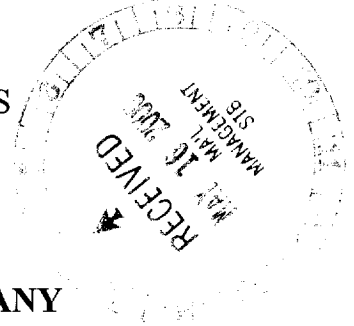
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STB Ex Parte No. 582 (Sub-No. 1)

**MAJOR RAIL CONSOLIDATION PROCEDURES**



**COMMENTS OF THE DOW CHEMICAL COMPANY**

The Dow Chemical Company ("Dow") hereby submits comments in response to the Advance Notice of Proposed Rulemaking ("ANPR"), served by the Surface Transportation Board ("STB" or "Board") in the above-captioned proceeding on March 31, 2000.

**I. Identity and Interest of Dow**

The Dow Chemical Company, headquartered in Midland, Michigan, is engaged in the manufacture and sale of chemicals, plastic materials, hydrocarbons, and a variety of specialty products. Dow, including its subsidiaries and affiliates, operates major production facilities throughout North America. The largest of these facilities are located on the Gulf Coast near Freeport, Texas and Plaquemine, Louisiana; in Fort Saskatchewan, Alberta; and in Midland, Michigan. Dow also operates numerous other facilities located across North America.

Rail is an integral part of Dow's transportation and distribution network. It is a cost-effective mode for transporting large volumes of Dow's chemical and plastics commodities long distances over land. Dow has been greatly impacted in mostly

negative ways by consolidation in the North American rail industry. It has participated actively before the Board in prior rail merger proceedings.

Dow is concerned with the high level of market concentration and reduced competition among railroads today. Therefore, Dow commends the STB for initiating this rulemaking. However, Dow strongly contends that the Board also can accomplish the goals of this proceeding without imposing a moratorium upon all rail mergers. A moratorium is unnecessary because the Board already has the authority to implement changes in its rail merger policy on a case-by-case basis.

The Board has sought comments on a broad range of issues. Dow has focused these comments upon those issues of greatest concern to it and to which Dow can contribute its own experience.

## **II. Promoting and Enhancing Competition**

Dow believes that the Board should be looking for ways to promote and enhance competition among rail carriers. This is required by the Rail Transportation Policy—

- (1) *to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates* for transportation by rail;
- (2) *to minimize the need for Federal regulatory control* over the rail transportation system . . .;
- (4) *to ensure* the development and continuation of a sound rail transportation system with *effective competition among rail carriers* and with other modes, to meet the needs of the public and the national defense;
- (5) to foster sound economic conditions in transportation and *to ensure effective competition* and coordination between rail carriers and other modes . . . ;
- (12) to prohibit predatory pricing and practices, *to avoid undue concentrations of market power*, and to prohibit unlawful discrimination;

49 U.S.C. § 10101 [emphasis added]. For too many years, the Board has interpreted these policies to require only the preservation of existing competition in rail merger proceedings. But, these policies are stated in a proactive tense, rendering the Board's prior interpretations much too restrictive.

This argument is even stronger today in light of the extensive consolidation that has occurred in the rail industry. Substantial competition has been lost and must be replaced. But, this cannot be done through regulations that are applicable solely to merging carriers. The STB must apply new pro-competitive rules to the industry as a whole.

**A. The STB Must Alter Its Treatment of Bottlenecks.**

Much of the competition that has been lost through prior mergers is the direct result of the Board's treatment of bottlenecks. In particular, the Board has repeatedly refused to recognize that the extension of a bottleneck, as the result of a merger, reduces competition. To justify this conclusion, the Board has adopted the so-called "one-lump" theory, which holds that, because a monopolist at the end stage of production is in a position to capture the entire monopoly profit, integration backwards upstream normally does not enable it to raise the profit maximizing price. In other words, the bottleneck carrier already reaps the monopoly profit for the entire movement prior to the upstream merger.

The applicability of the one-lump theory to railroad mergers simply is not supported by real shipper experience. For example, Dow ships substantial traffic volumes by rail from its Plaquemine, Louisiana facility to its facility at Pittsburg, California. Prior to the UP/SP merger, Dow tendered this traffic to the UP at Plaquemine, who could interchange the traffic with the BNSF at Sweetwater, Texas or the SP at Deming, New Mexico. At the first opportunity after the UP/SP merger,

however, the UP shifted that traffic to its extended long-haul from Plaquemine to Pittsburg, despite attempts by Dow and BNSF to include BNSF in the route.

Dow sees this gateway closure by UP as the first step towards eliminating BNSF participation in traffic to most of Dow's western facilities. Dow has a pre-merger contract to tender traffic by rail from Freeport to Pittsburg and Long Beach, California via UP to Sweetwater and via BN from Sweetwater to destination. When this contract expires in June 2001, Dow fully expects UP to short-haul the BNSF on those routes too, just as it did with the Plaquemine traffic. As a consequence, Dow will lose the switching allowances that BNSF currently pays Dow, thereby increasing Dow's costs. BNSF concessions at other plants on the West Coast also are in jeopardy.

The one-lump theory also focuses only upon rates. It ignores the fact that railroads also compete on service. Thus, even if the Board is correct that rates would not rise as a consequence of an end-to-end rail merger, the merger still denies captive shippers, such as Dow, a choice of rail carriers for the competitive segments of their routes. Without this competition, the incentives to provide good service are dramatically less.

The one-lump theory also cannot be squared with the Board's creation of the contract exception to bottleneck ratemaking. In the Bottleneck Decisions,<sup>1</sup> the Board concluded that, when a bottleneck carrier does not serve both the origin and destination points, it must quote a common carrier rate that the bottleneck shipper could use in combination with a contract rate from a carrier on the upstream competitive route segment. This clearly benefits the shipper who is able to use the constraining effects of rate regulation to prevent the bottleneck carrier from capturing the entire monopoly profit as predicted by the one-lump theory. However, if after an upstream merger the bottleneck carrier is able to serve both the origin and destination points, the contract

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<sup>1</sup> *Central Power & Light Co. v. Union Pacific R.R. Co.*, Nos. 41242 et al., 1996 STB LEXIS 358 (served Dec. 31, 1996), *clarified* 1997 STB LEXIS 91 (served May 1, 1997), *aff'd in part*, *MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8<sup>th</sup> Cir. 1999).

exception no longer will be available to the shipper. Thus, the one-lump theory is rendered inapplicable.

The contract exception recently was affirmed in *Union Pacific R.R. Co. v. STB*, 202 F.3d 337 (D.C. Cir. 2000). The Court noted that:

By permitting a shipper to enter into contracts that are beyond review of the Board, the Staggers Act entitles a contracting shipper to . . . “the benefit of its bargain.” Were its position to prevail, Union Pacific [the bottleneck carrier] would be in a position to recover for itself the “benefit of FMC’s bargain with CSX [the non-bottleneck contract carrier], as it could set a rate that allowed it to obtain the difference between a reasonable through rate and the FMC-CSX contract price.

*Id.* at 342. If there is indeed a benefit from downstream competition, as the Court recognized, then the merger of a bottleneck carrier with a downstream competitive segment carrier must have anti-competitive effects. This further refutes the applicability of the one-lump theory.

Even in the few situations where a shipper may still qualify to use the contract exception after a merger, the benefit of that exception will be reduced. This is because rate regulation will be required to constrain the bottleneck carrier’s rates over an extended bottleneck segment. Since, due to the Board’s sanction of differential pricing, a regulated rate will tend to be higher than a market based rate, the shipper still will suffer competitive harm.

The Board needs to recognize these facts, particularly in the current highly consolidated rail industry. Today, it is hard to conceive of a rail merger that would not give the merged carrier access to both the origin and destination points on most movements. At the very least, any future merger likely will extend the merged carrier’s long-haul to within 100 miles or less of any destination. The participation of other carriers will be limited to the role of switching. This will further reduce, if not eliminate, rail competition, particularly on transcontinental moves.

This reduction in competition already has occurred on a smaller scale on movements that take place entirely within either the eastern or western portions of the United States. Both regions are largely rail duopolies today. Although many shippers, and particularly those within the shared asset areas in the east, have access to both carriers; they only benefit from rail-to-rail competition if both carriers also serve the destination. Otherwise, the carrier with a destination bottleneck will preclude the participation of the other carrier.

Dow's Midland, Michigan facility would be adversely effected in this way as the remaining Class I railroads enter into a final round of transcontinental mergers. Midland currently has access to both the Canadian National (via a shortline connection) and CSX. A BN/CN merger likely would lead to a UP/CSX merger. Since Dow transports substantial volumes of traffic by rail between captive UP facilities on the Gulf Coast and Midland, a combined UP/CSX would eliminate the BN/CN as a competitor on most movements.

This harm would be particularly severe for Dow. First, because Midland is Dow's only major U.S. facility with competitive rail service, Dow would lose the ability to leverage Midland's traffic for rate concessions at Dow's captive facilities. Second, because Dow is the major rail customer on the segment of the shortline railroad that serves Midland, the loss of Dow's traffic likely will affect the financial health of that carrier adversely, jeopardizing its ability to serve Dow and smaller shippers on the Midland line segment.

Dow urges the Board to abandon the one-lump theory, allowing fact to triumph over fiction. When bottlenecks are extended as the result of a merger, the Board should preserve the pre-merger interchange point and require the bottleneck carrier to provide a separately challengeable common carrier rate to that point. This will preserve the bottleneck shipper's competitive position.

Moreover, the Board should promote competition by permitting shippers to separately challenge bottleneck rates even when the bottleneck carrier serves both the origin and destination. In most cases, the bottleneck carrier has not always served both points, but acquired that ability through a series of prior mergers. This represents a gradual, but significant, loss of competition over many years, which the Board should rectify.

**B. The Board Should Go Beyond the Suggested Competition Enhancing Measures in the ANPR.**

The Board has asked for comment on which competition-enhancing measures should be incorporated into its merger rules. The Board presents, by way of example, several suggestions from parties in Ex Parte No. 582, and asks for comment on them, and for any other suggestions. Dow already has suggested certain measures to promote competition with respect to bottlenecks and the one-lump theory. While Dow generally supports the suggestions made by other parties in Ex Parte No. 582, Dow is concerned that they do not go far enough. In addition, these suggestions should be expanded to apply to all railroads, not just merger applicants.

The Board should take steps to require carriers to maintain open gateways for all major routings. This is particularly important over the Mississippi River gateways because shippers in both directions currently have a choice of two carriers. A transcontinental merger would close those gateways. The preservation of existing gateways, however, does nothing to remedy the closing of gateways as a result of prior mergers. Moreover, a gateway must be kept commercially open. Otherwise, carriers still effectively can close a gateway by setting rates so high as to render them non-competitive.

Dow strongly supports a requirement that carriers offer, upon request, contracts for the competitive portion of joint-line routes when the joint-line partner has a

bottleneck segment. This will enhance the ability of qualified shippers to take advantage of the contract exception to bottleneck ratemaking. Currently, Dow is concerned that the predominant duopoly structure of the rail industry will be a disincentive to carriers to offer contracts under the contract exception. The small number of shippers who have invoked the exception since it was created in 1997 reinforces this concern.

Dow also supports a requirement that carriers provide switching, at an agreed-upon fee, to all exclusively served shippers located within or adjacent to terminals. This remedy, however, still omits most shippers who are located outside terminal areas.

Dow encourages the Board to consider a variation upon the Canadian statutory provisions for Competitive Line Rates (“CLRs”). Canadian Transportation Act §§ 129 – 136. CLRs permit a shipper located beyond a 30 km interswitching radius to apply to the regulatory agency to set a rate for traffic over the bottleneck railroad serving the shipper to an interchange point with another carrier. CLRs are calculated using applicable interswitching rates and local railroad revenue information derived from competitive situations. Dow also urges the Board to follow the Canadian practice of resolving CLR disputes through private binding arbitration. Dow, however, is opposed to the recent tightening of CLRs in Canada by requiring shippers to show “substantial commercial harm.”

Finally, the Board must revise its rules for obtaining reciprocal switching if it is to promote competition. The Board has adopted reciprocal switching rules at 49 C.F.R. Part 1144 and construed them in such a way as to virtually preclude a shipper ever from making a sufficient showing to obtain reciprocal switching. The best evidence of this fact is that no shipper has ever brought a successful reciprocal switching case. These rules need to be changed for the entire rail industry by eliminating the “competitive abuse” test and establishing clear and definite pro-competitive standards for obtaining reciprocal switching under 49 U.S.C. § 11102.

**C. Enhanced Competition Will Improve Service and Safety Performance.**

By promoting and enhancing competition, the STB also will address many of the other issues that it raises in the ANPR. This is particularly true for safety and service because competition will allow shippers to choose between carriers on those bases. This is the strongest incentive for a carrier to provide reliable, efficient, and safe rail service to customers.

Safety and service go hand-in-hand. If a carrier is involved in an accident, chances are the cargo will be damaged and certainly late. Moreover, large volume hazardous materials shippers, such as Dow, are extremely safety-conscious and will only tender hazardous materials to transportation carriers with a demonstrated safety record. If a carrier does not perform reliably and safely, a shipper will give its business to another carrier that will perform.

Most shippers today, including Dow, do not have that choice in the railroad industry. Moreover, the choices are dwindling with each successive merger. Thus, it should not come as a surprise that service has become the number one issue for shippers in recent years, at the same time that their choice of carriers has shrunk.

The CN has received numerous service and safety awards from Dow. Dow believes that CN's responsiveness to Dow's service and safety concerns is at least partially attributable to the more pro-competitive regulation of railroads in Canada. For example, Dow's Ft. Saskatchewan plant is open to reciprocal switching by the UP under Canada's interswitching rules.

The lack of competitive options became all too apparent in the United States during the UP/SP service crisis. Although the UP was providing abysmal service, most shippers had no choice but to continue tendering their traffic to it. For example, Dow asked the UP repeatedly to hand over large volumes of Dow's Freeport and Plaquemine traffic to other railroads at nearby interchange points in order to alleviate the congestion on UP's lines and to obtain better service. UP refused to give up this revenue, except in

token amounts intended to demonstrate to the Board that it was taking some remedial action. In a competitive environment, Dow would have shifted its traffic to a competitor who could offer better performance. Similarly, Dow and other shippers have few alternatives to NS and CSX during the current service crisis in the East.

These are extreme examples that have even deeper-rooted causes. But, they illustrate the problem that shippers face on a daily basis. If even normal service today is to improve, competition must be the catalyst. The Board cannot, and should not, mandate service improvements and then serve as a regulatory enforcer of its mandate. Competition will do the same thing much more effectively and consistent with the National Transportation Policy.

**D. Simplified and Expedited Rate Reasonableness Determinations are Required.**

Many of the pro-competitive actions proposed in the preceding sections will be of limited benefit unless the Board streamlines its process for resolving unreasonable rate complaints. For example, the ability to separately challenge a bottleneck rate is only pro-competitive if a shipper can obtain a determination from the Board in a timely and inexpensive manner.

Many shippers use contracts, which are not within the jurisdiction of the Board. Therefore, in order to challenge a bottleneck rate, they would have to shift to common carrier pricing and pay potentially higher rates for a period that could cover several years before obtaining a decision from the Board. Then, only if the shipper prevails will it receive reparations for the unreasonably high rates that it has been paying. Because this process is very costly to pursue, the potential benefits also must be substantial in order to justify a complaint. This is a tremendous risk that many shippers are unable or unwilling to take.

Even a large shipper such as Dow could find these risks and obstacles insurmountable. Although Dow is a large volume shipper, its traffic is spread over more than 3000 origin-destination pairs and its traffic patterns are frequently changing. To bring that many different rate complaints for only small amounts of money in each traffic lane is not cost justifiable. Furthermore, by the time the Board issues a decision, traffic no longer may be moving over those lanes. This is precisely why unit-train shippers today bring most rate complaints, since that type of traffic presents sufficient economies of scope to economically justify a complaint.

Dow urges the Board to streamline and expedite its rate reasonableness determinations so that captive shippers like Dow can take advantage of the statutory protections against unreasonable rates. The Board should establish the standards and procedures for resolving such disputes, but then allow those disputes to be resolved by binding arbitration. The Board should require merging carriers to engage in mandatory arbitration of rate disputes. Such arbitration would be binding and would have to be completed within a fixed time period, approximately 90 days. The arbitrators would apply standards adopted by the Board. This would resolve many of the obstacles that Dow, and other shippers, would face in their attempts to realize the full benefit of all pro-competitive options.

### **III. Treatment of Merger Benefits**

The Board has asked for comment on how claims of public benefits should be treated under the merger rules. Dow believes that the Board has been much too willing to accept the applicants' estimations of public benefits in past mergers.

The projection of such benefits is more of an art than a science. Numerous variables and assumptions are required and the results are anything but precise. Furthermore, the ultimate determination of merger benefits is subject to substantial manipulation to achieve a desired result.

In hindsight, it appears that the benefits of most prior mergers have been grossly overstated. Some parties will undoubtedly assert that it is too early to make this judgment. Even if true, those parties cannot deny that the merger benefits have not been realized at anywhere near the pace that they were projected to occur; nor can those parties guarantee that those benefits eventually will be realized. This dispute illustrates the very imprecise and uncertain nature of these benefits.

Recently, questions have been raised about the Board's willingness and ability to engage in a critical analysis of benefits. This may not be the Board's fault, since the projection of such benefits is very amorphous and inexact. But, it imposes upon the Board a high level of responsibility to protect the public interest from the potential that projected benefits will not be fully realized.

A key factor in determining if a merger is in the public interest is the effect of the proposed merger on costs and rates. The potential benefits must exceed the costs for the merger to be in the public interest. In addition, if costs exceed the benefits, there is a risk that the higher costs will be recovered in captive shipper rates.<sup>2</sup> This also would be contrary to the public interest and to the Board's statutory mandate to ensure reasonable rates.

Dow urges the Board to follow the example of the Federal Energy Regulatory Commission ("FERC") in its merger policy statement. *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, III FERC Stats. & Regs. (CCH) ¶ 31,044 (1996). In that proceeding, FERC sought to revise its merger policy in light of the increasingly competitive nature of the electric utility industry. With respect to merger benefits, FERC determined:

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<sup>2</sup> Dow is aware that the Board rejected this proposition in the Conrail Decision. Dow believes, however, that conclusion is incorrect. The Board relied extensively on the ICC's decision in *Railroad Revenue Adequacy – 1988 Determination*, 6 I.C.C.2d 933 (1990), *aff'd sub nom.*, *Association of American Railroads v. ICC*, 978 F.2d 737 (D.C. Cir. 1992), to contend that the largely competitive nature of the rail industry would preclude the recovery of acquisition costs in captive shipper rates. But, that decision dealt with the effect of acquisition costs on *total* carrier earnings. Dow's concern is with the effect of the acquisition costs on the rates of *individual* captive shippers over *specific* routes.

Rather than requiring estimates of somewhat amorphous net merger benefits and addressing whether the applicant has adequately substantiated those benefits, we will focus on ratepayer protection. Merger applicants should propose ratepayer protection mechanisms to assure that customers are protected if the expected benefits do not materialize. The applicant bears the burden of proof to demonstrate that the customer will be protected. This puts the risk that the benefits will not materialize where it belongs – on the applicants.

*Id.* at ¶ 30,123.

The FERC solution recognizes and responds to the practical difficulties of measuring merger benefits. It would reduce the importance of the STB's review and approval of the merger benefits and it would minimize the risk to the public interest if the projected benefits were not realized. Most importantly, this solution would accomplish what applicants, shippers, and the Board all have agreed upon in prior mergers: that the applicants should bear the risk that the benefits of a merger will not materialize. Currently, this is not the case.

#### **IV. Safeguarding Rail Service**

As previously stated in these Comments, Dow believes that the most effective way to safeguard rail service is to promote and enhance rail competition. Dow also recognizes, however, that the present level of consolidation in the rail industry and its infrastructure makes true competition in its purest form difficult to achieve across the national rail network. For that reason, Dow would support regulations to protect shippers and shortline railroads from the types of service disruptions that have been associated with recent mergers.

The best regulations would address the root causes of service disruptions before they occur. For example, in the UP/SP service crisis, the Board identified a lack of rail infrastructure as a key factor building up to the crisis. This factor, among others, also is a contributor to the eastern service crisis. The Board should examine more critically

whether a merged system will have the capacity and infrastructure to handle projected increases in traffic volumes and changes in traffic patterns.

In the event service disruptions do occur, the Board should have procedures in place to assist all persons who suffer damages to recover their claims. In both the UP/SP service crisis and the Eastern service crisis, shippers and shortlines have suffered many millions of dollars in damages. These damages have resulted from delayed shipments, lost shipments, lost business, plant shutdowns, railcar shortages, alternative transportation costs, product rehandling costs, and a multitude of other reasons. The one common element behind these damages is that, but for the merged carriers' inability to provide adequate service, these losses would not have been incurred. Yet, although not at fault, the shipper is forced to bear the burden of these costs.

Dow has extensive first-hand knowledge of the damages caused by service failures. As a result of the UP/SP service crisis, Dow, who is captive to the UP at its two largest North American production plants, suffered losses in the millions of dollars. Because of the enormity of those losses, Dow could justify the tremendous expense of a lawsuit to recover its damages. Dow ultimately settled its claims with the UP.

In other instances, however, shippers may sustain losses that do not justify the risk and expense of a lawsuit. Nevertheless such losses can be both substantial and devastating. In some cases, a shipper's entire business may be jeopardized. In other cases, the losses may not be large in the aggregate, but may be very substantial for certain traffic lanes or customers. These shippers often recover nothing from the responsible carriers, however, because those carriers know that the shippers likely will not, or cannot, file a lawsuit. It is unfortunate that a shipper often must initiate a legal action to even have the opportunity to recover its damages from the clear and acknowledged responsible party. Moreover, if carriers are held accountable for these losses, they may pay much more attention to service.

To address this injustice, Dow urges the Board to establish procedures for the expeditious binding arbitration of damage claims arising from merger-related service crises. As a merger condition, the Board should require the applicants to arbitrate service-related loss and damage claims, if the shipper elects to arbitrate. The shipper, however, would retain the right to submit its claims to a court if it so chose.

Although the Board does not have jurisdiction to adjudicate loss and damage claims or contract disputes, it still has the legal authority to impose an arbitration condition upon a merger. In the Conrail acquisition decision, *CSX Corp. et al.--Control and Operating Leases/Agreements--Conrail Inc. et al.*, STB Finance Docket No. 33388, Decision No. 89, p. 74 (served July 23, 1998), the Board invoked its authority under 49 U.S.C. §11321 to void contract anti-assignment clauses. Also, in *Rules, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims*, 340 I.C.C. 515, 540 (1972), the former ICC concluded that it had sufficient authority “to establish proper and reasonable procedures for the timely, proper, and efficient processing and disposition of loss, damage, and other similar claims.”

Under Dow’s proposal, the Board could require the applicants to agree to binding arbitration as a condition of the merger, under 49 U.S.C. § 11321, for both common and contract carriage claims. The applicants always have the option not to merge if the condition is unacceptable to them. Similarly, the Board would not violate the contract rights of any shipper if the decision to arbitrate remains within the shipper’s discretion. Under the same principal used to promulgate claims processing regulations, the Board also may adopt a procedural framework for the conduct of these arbitrations. The Board, however, should not place itself in a position to review the arbitration decisions, since that could violate the jurisdictional allocations in the Carmack Amendment.

## **V. Downstream Effects**

Dow supports the Board's proposal to eliminate the "one case at a time" approach at 49 CFR § 1190.1(g). This proposal, however, comes years too late for many shippers.

As far back as the BN/SF merger, the path of future rail mergers was apparent. Thus, the responsive merger of the Union Pacific with the Southern Pacific came as no surprise to the railroad and shipping communities. The only legitimate question after that merger was how CSX and Norfolk Southern would resolve their fight over Conrail. Once that question was answered, the only remaining question has become which carriers will merge to create the first transcontinental railroad. The fallout from such a merger inevitably will force the remaining carriers to merge in response.

By not considering the downstream effects of each of these mergers, the Board constrained its own ability to address the adverse competitive consequences of each subsequent merger. A more forward-looking approach might have enabled the Board to fashion more appropriate and effective remedies to preserve competition. The Board also should have given more serious consideration to conditions that would have promoted and enhanced competition. It is not too late, however, for the Board to consider the downstream competitive effects in future mergers.

The rail industry has consolidated to a point where it no longer is burdensome for the Board to consider downstream effects. There are only a few "strategic" responses to any rail merger, which substantially reduces the range of uncertainty that the Board must consider. A downstream analysis of the cumulative impacts and crossover effects of a merger is necessary to determine all of the effects of a proposed merger.

## **VI. "Three-to Two" Issues**

The Board has asked whether it should give greater weight to arguments of competitive harm in mergers that reduce a shipper's options from three rail carriers to two. Dow certainly believes that significant competition can occur in this situation.

However, the horse is out of the barn on this issue. There are few, if any, remaining three-to-two points in existence today.

The most likely three-to-two points today are the Mississippi River gateways where the two western carriers connect with the two eastern carriers and perhaps the CN or KCS. Even these points, however, may not be genuine three-to-two points since the Eastern carriers' lines primarily go East and the Western carriers' lines primarily go West.

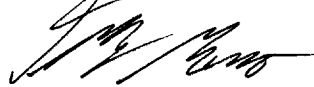
Dow experienced the loss of three-to-two competition in the UP/SP merger. In that proceeding, Dow sought to preserve a build-in to its captive facility at Freeport, Texas. At the time there were two carriers exploring a build-in, the SP and BNSF. However, the SP by far was the more aggressive and interested carrier. In contrast, BNSF's interest ebbed and flowed with the activities of the SP. This was a clear example of the pro-competitive impact that a third competitor can have on an otherwise complacent second competitor. Duopolies enhance the risk that competitors will become comfortable in their current positions and choose not to compete too aggressively against the dominant carrier in one market out of concern that they will invite a similar challenge to their dominance in another market.

## **VII. Conclusion**

The actions taken by the Board in this proceeding will determine the face of the North American rail landscape for decades to come. The Board has the opportunity to give substantive meaning to the pro-competitive mandates in the National Transportation Policy. However, it will have to abandon many long-held principals, and out-dated and inapplicable rules and policies. The Board also needs to venture further than it has proposed in the ANPR. It must reevaluate its rules for the entire industry, not just merging carriers, and it must restore competition lost in prior mergers, not just future mergers. The Board also must expedite and streamline the procedures for resolving rate

and claim disputes, preferably through mandatory and binding arbitration. By creating a truly competitive rail industry, the Board will enhance service, safety, and the financial health of the industry.

Respectfully submitted,

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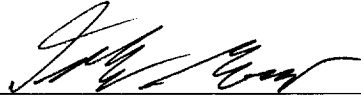
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*Counsel for The Dow Chemical Company*

May 16, 2000

### **Certificate of Service**

I certify that I have this 16<sup>th</sup> day of May 2000, served copies of the "Comments of The Dow Chemical Company" upon all parties of record in this proceeding, by First Class mail.

A handwritten signature in black ink, appearing to read "Jeffrey O. Moreno", is written over a horizontal line.

Jeffrey O. Moreno